

NO. 45641-9-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

LYSANDRA NESS,

Appellant,

vs.

JIAN SONG AND JANE DOE SONG,
husband and wife, and the marital community,

Respondents.

APPEAL FROM THE PIERCE COUNTY SUPERIOR COURT
THE HONORABLE STEPHANIE AREND
Cause No. 13-2-08604-8

BRIEF OF RESPONDENT

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I. NATURE OF CASE

A. STATEMENT OF FACTS Re Accident And Service of Process

On April 29, 2010 plaintiff Lysandra Ness and Song were involved in an accident. The police were called to the accident. Song gave to the police his the address where he and his wife were living at the time—1502 N Steele Street, Apt. C, Tacoma, WA 98406 (“Tacoma address”). (CP 22-28)

On July 1, 2010, the Songs moved to their current address: 13214 SE 252nd Street, Covington, Washington, 98042 (“Covington address”) and have lived at that address without interruption since moving there.¹

On April 25, 2013, Ness filed this claim for personal injuries arising from the April 29, 2010 accident. The Songs were not served with the summons and complaint, nor was anyone at their address.²

On April 29, 2013 the statute of limitations ran on this action.

On June 13, 2013, Ness filed the following pleadings: Confirmation of Service, Affidavit of Publication, Summons for Publication, Affidavit of Ronald D. Ness (Ness’s counsel) and a

¹ *Declaration of Jian Song*. (CP 22-28)

² *Id.*

photocopy of an envelope from plaintiff's counsel's office addressed to Song at the address on the police report.³ The affidavit of Ness dated June 7, 2013 states :

2. We attempted to serve Jian Song with the summons and complaint twice, but were unable to locate him. We have sent a copy of the summons and complaint to his last known address.

The attached envelope address to the Tacoma address bears a date and time stamp of June 13, 2013 PM.⁴ According to Mr. Song, he received in the U. S. mail an envelope addressed to him at his Covington address on June 17, 2013 and the summons and complaint were enclosed. That envelope bears the date and time stamp of June 13, 2013 PM.

See Declaration of Song and attached envelope. (CP 22-28)

Both envelopes were mailed 6 days after the affidavit of Ronald D. Ness is apparently dated. Ness produced no envelope showing a mailing by June 7, 2013. (CP 32-44).

³ Declaration of Robert A. Mannheimer, EX. A. (CP 13-21)

⁴ See Declaration of Robert A. Mannheimer and attached exhibits.(CP 13-21)

B. STATEMENT OF FACTS Re Late File Pleadings And Service of Pleadings.

Song filed and served the Motion for Summary Judgment by October 5, 2013. (CP 1-12).

Ness filed Ness's Reply to the Motion for Summary Judgment on November 4, 2013. (CP 32-44).

The Trial Court granted summary judgment in favor of Song on November 8, 2013. (CP 68-70).

Ness moved for Reconsideration. (CP 71-94).

The Trial Court denied the Motion based on procedural defects relating to service and filing of working copies per local rules. (CP 107).

C. Statement of Procedures

Song moved for summary Judgment on October 2, 2013. (CP 1-12)

The Trial Court granted summary judgment in favor of Song on November 8, 2013. (CP 68-70).

Ness moved for reconsideration on November 18, 2013. (CP 71-94).

Ness filed the Notice of Appeal on December 2, 2013. (CP 104).

The Trial Court denied the Motion for Reconsideration on December 13, 2013. (CP 107).

II. ISSUES PRESENTED

A. Did the Trial Court Abuse Its Discretion By Not Considering the Late Filed Pleadings?

B. Was the Trial Court's Granting of Summary Judgment For Lack of Service of Process Proper Under the Circumstances, Even If The Trial Court Had Considered the Late Filed Pleadings?

III. ARGUMENT

A. THE COURT DID NOT ABUSE ITS DISCRETION IN NOT CONSIDERING THE LATE FILED PLEADINGS.

Trial courts have discretion whether to accept untimely filed documents. *O'Neill v. Farmers Ins. Co. of Wash.*, 124 Wn. App. 516, 521, 125 P.3d 134 (2004). A trial court may accept late filed pleadings only if the party establishes excusable neglect. *Colo. Structures, Inc. v. Blue Mtn. Plaza, LLC*, 159 Wn. App. 654, 660, 246 P.3d 835 (2011) (citing CR 6(b)(2)).

See also *Idahosa v. King County*, 113 Wn. App. 930, 937, 55 P.3d 657 (2002)(the trial court did not abuse its discretion when striking a late summary judgment response given the trial court's observation of the party's dilatory pattern, the lateness of the response, and the proximity to trial.)

Ness failed to either file or, otherwise, serve pleadings in a timely manner in compliance with Pierce County Local Rules or Civil Rules. See PCLR 7(a)(3)(A), PCLR 7(a)(4) and PCLR 7(a)(7) and CR 56(a) and CR 5(2)(a). (Ness may not have filed with the Trial Court working copies of the motion for reconsideration.)

The following were filed late - Affidavit of James Harris (CP 45-46), Affidavit of Sheena Hudson (CP 47), Declaration of Ronald D. Ness (CP 66-67), Declaration of Susan Montez (CP 48-49) and Ness's Reply to Defendant's Motion for Summary Judgment (CP 32-44). See also Defendant Song's Opposition to Ness's Motion For Reconsideration (CP

95-103) for a recitation regarding failing to serve the Motion for Reconsideration and the Court's Order of December 13, 2013. (CP 107).

While the Trial Court did not sign the Proposed Order Striking Ness's late filed pleadings during the hearing on the Motion for Summary Judgment, the Order granting the Motion for Summary Judgment identified the pleadings considered. (CP68-70). The Court did not consider Ness's pleadings. See also RAP 9.12.

Notwithstanding Ness' counsel reasons for the late filing, the Trial Court did not find the excusable neglect. The note for hearing was filed and served on September 30, 2013 for a hearing date of November 8, 2013 (more than the 28 calendar days allowed under the Civil Rules). The Motion was mailed on October 2, 2013 and deemed served three calendar days later or October 5, 2013.

Ness's counsel attended a law school reunion between October 3, 2013 and October 7, 2013. See Declaration of Ronald D. Ness (CP 67-68). Ness' response to the Motion for Summary Judgment was due on October 28, 2013. CR 56. Ness's counsel did not review the pleadings until October 29, 2013 and filed Ness' response on November 4, 2013. (CP 67-68). Ness's counsel asserted: "It was physically impossible for me to comply with the rule in CR 56 as I was not in my office, nor was I working in time to meet that deadline." (CP 67-68). Ness's counsel did not explain first reviewing the Motion on October 29, 2013.

The Trial Court considered the declaration and found no excusable neglect to explain the late filing of the pleadings. Ness's counsel does not

state that his law office was closed . Ness's counsel returned from the law school reunion on October 6, 2013. Ness's counsel did not affirm in the Declaration when counsel was first made aware of the then pending Motion for Summary Judgment. While the described surgery could be the basis for excusable neglect, Ness's counsel again describes no lack of knowledge of the pending Motion or the inability to work on the Motion or formally move for Continuance or arrange for other counsel to work on the response to the Motion during the pendency of the Motion.

Ness's counsel worked on the response to the Motion for Summary Judgment and obtained the declarations deemed necessary– between October 29, 2013 and November 4, 2013 or seven days (which is during the time Ness's counsel was advised to not return to work). However, Ness's counsel does not explain not attending to the pending Motion prior to October 29, 2013.

The Trial Court found no excusable neglect and denied the verbal request for a continuance made on November 8, 2013.

As for the Motion for Reconsideration, the Trial Court found the defects in service and providing working copies to be inexcusable.

B. The Motion for Summary Judgment Was Properly Granted As Ness Failed to Serve Process as Required.

RCW 4.28.100 provides :

When the defendant cannot be found within the state, and upon the filing of an affidavit of the plaintiff, his agent, or attorney, with the clerk of the court, stating that he believes that the defendant is not a resident of

the state, or cannot be found therein, and that he has deposited a copy of the summons (substantially in the form prescribed in RCW 4.28.110) and complaint in the post office, directed to the defendant at his place of residence, unless it is stated in the affidavit that such residence is not known to the affiant, and stating the existence of one of the cases hereinafter specified, the service may be made by publication of the summons, by the plaintiff or his attorney in any of the following cases:

...

(2) When the defendant, being a resident of this state, has departed therefrom with intent to defraud his or her creditors, or to avoid the service of a summons, or keeps himself or herself concealed therein with like intent;

...

Ness's affidavits fail to establish that defendant Song could not be found within the state. Ness identified Song's current address in Covington. Ness attempted service only three times at the Covington address. To show a defendant cannot be found, Ness must demonstrate Ness "made reasonably diligent efforts to personally serve the defendant." *Boes v. Bisiar*, 122 Wn.App. 569, 574, 94 P.3d 975 (2004). See also *Martin v. Meier*, 111 Wn.2d 471, 481, 760 P.2d 925 (1988). The facts must clearly support the conclusion that all statutory conditions are met. *Pasqua v. Heil*, 126 Wn. App. 520, 527, 108 P.3d 1253 (2003).

RCW 4.28.100 provides that an order for publication can be obtained where a defendant cannot be found in the "state."... The information provided to the trial court here only disclosed that Stokes could not be found in Cowlitz County. It goes without saying that the state of Washington is much larger than Cowlitz County, and the fact that he cannot be found in that county sheds little light on the question of whether or not he reasonably can be found in the state. In light of the total lack of

information provided to the trial court concerning the efforts to find Stokes in the state, it is clear that there was an insufficient showing to warrant service by publication. Longview was not entitled to an order authorizing service on Stokes by publication, and, consequently, the trial court did not acquire jurisdiction over Stokes by such service. The motion to vacate should have been granted. [footnotes omitted]

Longview Fibre Co., v. Stokes, 52 Wn. App 241, 245-246, 758 P.2d 1006 (1988).

Song disputes that Ness's affidavits establish that Song did not live at the Covington address. Even if that were the case, Ness has failed to establish that Song could not be found in the state. The "fact" that Ness could not find Song at the Covington address does not establish that Song could not be found in the state, as the court noted in *Longfibre*. Ness has failed to establish compliance with the statute for service by publication.

Further, Ness has failed to establish a factual basis to assert that Song was evading service or defrauding creditors. Ness only attempted service at the current address three times. It is unclear at what times each attempt was made in May 2013. Ness has until July 25, 2013 to attempt personal service. There is no explanation why Ness did not continue to attempt personal service in June or July before the statute of limitations ran.

To satisfy RCW 4.28.100(2), an affidavit must set forth facts establishing that Ness's efforts to personally serve the defendant were reasonably diligent and that the defendant either left the state with intent to defraud creditors or avoid service, or concealed herself within the state with the same intent. *Charboneau Excavating, Inc. v. Turnipseed*, 118 Wn.

App. 358, 362-63, 75 P.3d 1011 (2003), *review denied*, 151 Wn.2d 1020 (2004). A bare recitation of the statutory factors required to obtain jurisdiction is insufficient; the Ness must produce specific facts supporting the conclusions the statute requires. *Pascua v. Heil*, 126 Wn. App. 520, 527, 108 P.3d 1253 (2005); *see also Brennan v. Hurt*, 59 Wn. App. 315, 317, 796 P.2d 786 (1990)(strict compliance with statute required for jurisdiction to attach), *review denied*, 116 Wn.2d 1002 (1991).

The statute does not authorize alternative service simply because the defendant cannot be found. *Lepeska v. Farley*, 67 Wn. App. 548, 553, 833 P.2d 437 (1992).

Ness counsel's declaration of June 7, 2013 provides no factual basis for the publication of the summons. It states Mr. Song could not be found. There is no showing of any facts that Mrs. Song could not be found or was served.

That Ness did not accomplish personal service at current address does not factually support a conclusion that defendants Song were evading service or had departed the state with the intent to defraud creditors. See *Kennedy v. Korth*, 35 Wn. App. 622, 624, 668 P.2d 614 (fact that defendant moved to Germany before malpractice actions were filed negates assertion he left Washington to avoid service of process), *review denied*, 100 Wn.2d 1026 (1983). See also *Bruff v. Main*, 87 Wn. App. 609, 614, 943 P.2d 295 (1997) (Bruff's affidavits contained no facts clearly suggesting that Main's change of residence, or any other conduct, was undertaken with the intent required by RCW 4.28.100(2)) and *In re*

Marriage of Powell, 84 Wn. App. 432, 437, 927 P.2d 1154 (1996)(nothing in affidavit established that defendant was evading service).

As for the claim of one of the investigators (Harris) for Ness opined that to him – “[i]t looked to me as if the house was vacant” the only facts identified were that the lights were not on and no one came to the door. These facts establish no statutory requirements necessary for publication. Lights might not be on if people were at work and children were at school or people were shopping or on errands or on vacation. Similarly no one would come to the door if no one was at home during the day during working hours or at night if out for dinner or many other explanations. The affidavit lacks sufficient facts or details to establish a basis for publication.. Song stated in his declaration that the Songs continue to live at the Covington address.

Finally, Ness failed to mail the Summons and Complaint to the Songs before “publishing” the summons. Despite the affidavit of Sheena Hudson she mailed a copy of the summons and complaint on June 7, 2013, The Exhibit A of Declaration of Jian Song contains the copy of the outside of the envelope which shows that the letter mailed to Song by Ness was date stamped for June 13th, not June 7th. Oddly, attached to the Affidavit of Ronald D. Ness which was “signed” on June 7th to support publication is an envelope bearing the post mark date of June 13th and a returned to sender date of June 18th. [Both envelopes addressed to Song were mailed by Ness’s counsel on June 13th, not by June 7th as attested to by Ness’s counsel and the secretary for counsel.] The late affidavits

submitted by Ness with the motion for reconsideration do not alter these facts. The statute requires mailing of the summons and complaint before publication.

The statute requires that Ness will have mailed the summons and complaint before publishing. Here the summons was published on June 10, 2013. Although Ness states Ness mailed the summons to Song by June 7th (Hudson's declaration states on or about June 7th) there is no copy of the envelope attached to the Ness's submissions that contradict the copy of the envelope received by the Songs which shows a June 13th mailing date.

IV. CONCLUSION

The Court is respectfully requested to affirm granting Song's motion for summary judgment.

DATED this 9 day of June, 2014.

ROBERT A. MANNHEIMER, P.S.

By Robert A. Mannheimer permission
Robert A. Mannheimer WSBA 14064 given by
Attorneys for Respondent email.

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LYSANDRA NESS,

Appellants,

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JIAN SONG AND JANE DOE
SONG, husband and wife, and the
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Respondents.

NO. 45641-9-II

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 9th day of June, 2014, I caused a true and correct copy of the following document to be delivered via facsimile and by posting in U.S. mail with sufficient postage and properly addressed envelope and via legal messenger for next day delivery to the following counsel of record:

Brief of Respondents

ATTORNEY FOR APPELLANT:

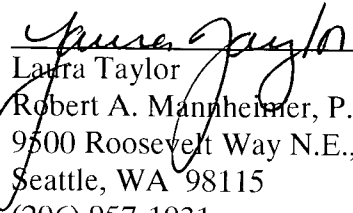
Ronald Ness,

LAW OFFICES OF RONALD D. NESS AND ASSOCIATES

420 Cline Avenue,

Port Orchard, WA 98366

DATED this 9th day of June, 2014.



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